IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13/09/2004

CORAM

THE HONOURABLE Mr JUSTICE P.D.DINAKARAN

W.P.No.1387 of 1997

Col.K.Malaippan .... Petitioner

-Vs-

1. The Government of India,
rep. by Secretary to Government,
Ministry of Defence, South Block,
D.H.G. Post, New Delhi 110 011.

2. Military Secretary,
Army Head Quarters,
D.H.G. Post, New Delhi - 110 011. .... Respondents

Writ petition filed under Article 226 of The Constitution of India
praying for the issuance of writ of certiorarified mandamus as stated therein.

For Petitioner : Mr. N.S.Sivam

For Respondents: Mr. V.T.Gopalan, Addl. Solicitor General
Assisted by Mr.V.Balasubramanian,
ACGSC

:O R D E R
The request of the petitioner to change the date of birth from 15.0 7.44 to 22.06.46 and his consequential claim to continue his service upto 30.06.1999 was rejected by the first respondent in his proceedings dated 30.07.1996. Hence, the petitioner has chosen to file the present writ petition seeking to call for the records of the respondents culminated in Order No.7(6)/91/D(MS) dated 30th July 1996 of the first respondent and quash the said order No.7(6)/91/D (MS) dated 30th July 1996 and direct the respondents to incorporate 22.06.1946 as the date of birth of the petitioner in the service records and accord all service benefits like promotions and other monetary benefits that will lawfully accrued to the petitioner in the service upto 30.6.1999 .

2.1. In brief, the petitioner joined service in the Army on 20.12.1970 declaring his date of birth as 15.7.1944 and the same has been duly entered into his service register. The Government of India in the Official Memorandum dated 21.04.1964 concededly prescribed that no request for change

of date of birth would be entertained after the lapse of two years from the date of i) grant of first commission in the case of commissioned officers and (ii) enrolment in case of JCOs/ Other ranks and equivalent in the other two services. The above time of two years to request for change of date of birth expires on 19.12.19 72 in the case of the petitioner.

2.2. However, the petitioner had chosen to make a representation to the second respondent only on 23.2.1977, requesting the second respondent to change the date of birth of the petitioner from 15.07.1944 to 22.6.1946. The only explanation according to the petitioner was that, he was in the Field Area from 24.3.1972 to 17.11.1979 and therefore the limitation prescribed under the said Official Memorandum is not applicable in view of the provisions of the Indian Soldiers (Litigation) Act 1925 (hereinafter referred to as 'The Act). Since the respondent by their letter dated 25.10.1977 informed the petitioner that his request could be considered only if he could get the date of birth corrected in his University records and in the S.S.L.C, the petitioner had chosen to move the Civil Court to declare his correct date of birth as 22.06.1946, which culminated into a decree dated 06.03.19 84 made in S.A.No.615 of 1979 declaring his correct date of birth as 22.06.1946.

2.3 Concededly, even though the Director of School Education, Madras and District Collector, Madurai were impleaded as parties to the suit proceedings, the respondents were not impleaded as party at all. Of course, the Government in G.O.M.S.No.48 Education Department dated 12.01.1987, as a special case, directed the Director of School Education if satisfied himself, based on the decree in S.A.No.615 of 1977 dated 06.03.1984, to correct the date of birth of the petitioner in his school records, namely, S.S.L.C. Based on the above documents, the petitioner requested the first respondent to correct his date of birth in his service register and other consequential attendant benefits. The first respondent after careful consideration however rejected the request of the petitioner, by the proceedings dated 30.07.1996, which is impugned in the above writ petition.

3. In this connection, it is apt to refer the relevant portion of the impugned order dated 30.07.1996, which reads as follows:
"... Government of India vide MOD officer Memorandum No.35(1)/A/63/D(Coord) dt. 21 April 1964 prescribed that no request for change of date of birth will be entertained after the lapse of two years from the date of (i) grant of first commission, in case of commissioned officers and ; (ii) enrolment in case of JCOs/ORs and equivalents in other two services. It was informed during discussions on this case that these instructions have been uniformally followed by the Government in all cases of officers past except in cases where change of the date of birth was ordered by the Courts, even when the application was made after two years. It will, therefore, be unjust to the officers whose applications were rejected on this basis if any relaxation is allowed in the present case.
I also find that in the case of Union of India Vs. Harnam Singh (199 3(2); SSC page 162), decided by the Honourable Supreme Court of India in 1993, the Honourable Court ruled that a Government Servant must apply for correction of date of birth without any unreasonable delay and that the Government was

competent to fix a reasonable time limit after which no application for correction of date of birth can be entertained.
I am of the opinion that 2 years time limit prescribed by the Government, as mentioned above, is quite reasonable. The officer in his petition before the Honourable Delhi High Court has tried to take advantage under the order 663 of 73. The officer's averment that the limitation period was not applicable in his case in view of Army Order 66 3/73, is untenable. This order is applicable only to the officers belonging to the Corps other than Engineers, Medical, Signals & EME who were initially granted Short Service Regular Commission and to those commissioned from JCSO/ORs fulfilling certain conditions. The officer does not fall under any of these categories and hence cannot claim any advantage under this order.
I am, therefore of the view that the officer had reasonable time available to him to make application for change of date of birth, within the time limit prescribed by the Government, but he failed to do so. There is no case to allow any relaxation of this limitation to him. Hence, the application of 9th May 1987 filed by Maj (now Col) K. Maliappan of Corps of Signals is hereby rejected."

4. Assailing the said order dated 30.07.1996, Mr.N.S.Sivam, learned counsel appearing for the petitioner submits that two years period of limitation is not applicable for the reasons that he was in the Field Area between 24.3.1972 and 17.11.1979, and in any event, he is entitled for the benefits of the decree dated 06.03.1984 made in S.A.No.615 of 1977 and G.O.Ms.48, Education Department dated 12.01.1987.

5. Per contra, Mr.V.T.Gopalan, Additional Solicitor General appearing for the respondents contends that the provisions of the Indian Soliders (Litigation) Act would not be applicable to the petitioner as it is applicable only for defending the suits or appeals filed against the soldiers. It is further contended that the decree dated 06.03.1 984 made in S.A.No.615 of 1977 and consequential Government order G. O.Ms.No.48 Education Department dated 12.01.1987 are not binding on the respondents as the respondents are not parties to the proceedings.

6. From the above contentions, the following issues arise for my consideration:
i) Whether the Indian Soldiers (Litigation) Act 1925 is applicable to the facts and circumstances of the case?
ii) Whether the decree dated 06.03.1984 made in S.A.No.615 of 1977 is binding on the respondents or not ? and
iii) To what relief the petitioner is entitled to?

7.1 Issue No.1: Whether the Indian Soldiers (Litigation) Act 1925 is applicable to the facts and circumstances of the case?

7.2. As per the statement of objects and reasons for enacting the Indian Soldiers (Litigation) Act 1925, the Act is intended to consolidate and amend the law to provide special protection in respect of the civil and revenue litigation of Indian Soldiers serving under war condition. The Act applies to Indian Soldiers serving under War conditions and provides

inter-alia for the postponement in certain circumstances of civil and revenue proceedings in which an unrepresented Indian Soldier is a party and for the deduction from periods of limitation in suits appeals or applications by Indian Soldiers of the periods during which they have been serving under war conditions.

7.3. Even though there is no bar neither under the Indian Soldiers (Litigation) Act 1925 nor under any Government Memorandum for the petitioner to make representation within two years, the petitioner had not chosen to make any representation within the said time. It would be a different issue if the petitioner had made such representation on or before 19.12.1972 and the respondent required the petitioner to file a suit getting his University and school records corrected and in which event certainly the provisions of the Act would have been made applicable, and the period of limitation would thus have been protected. Therefore, in my considered opinion, the petitioner is not entitled to say that the period of limitation prescribed under the Government order that he should have made request within two years on or before 19.12.1972 is protected under the Act cannot be sustainable. Hence, the issue No.1 is answered accordingly.

8.1. Issue No.2: Whether the decree dated 06.03.1984 made in S.A. No.615 of 1977 is binding on the respondents or not ?

8.2. The petitioner having joined in the service declaring his date of birth as 15.07.1944 and while seeking correction of his date of birth, ought to have been impleaded the employer in the Civil suit. Since the petitioner had deliberately failed to implead the respondent as a party in the suit, as rightly contended by the learned Additional Solicitor General, the said decree in the Second Appeal No.615 of 1977 much less the consequential Government order G.O.Ms.No.48 Education Department dated 12.01.1987 is not binding on the respondents.

8.3. The Apex Court in Union of India v. C.Ramaswamy and others reported in (1997) 4 SCC 647, whereunder one Mr.Ramaswamy has adopted a novel method to pursue his desire to get his date of birth altered by filing a suit before the District Munsif, Sholinghur impleading the Director of School Education, Madras; District Educational Officer, Vellore and his eldest sister Kamala as defendants without impleading his employers, namely, The Andra Pradesh Government where he was recruited as I.P.S. Officer in the cadre strength of Andrapradesh and the Apex Court depreciating such attempts held as follows:
...para 25. " In matters relating to appointment to service various factors are taken into consideration before making a selection or an appointment. One of the relevant circumstances is the age of the person who is sought to be appointed. It may not be possible to conclusively prove that an advantage had been gained by representing a date of birth which is different than that which is later sought to be incorporated. But it will not be unreasonable to persume that when a candidate, at the first instance, communicates a particular date of birth there is obviously his intention that his age calculated on the basis of that date of birth should be taken into consideration by the appointing authority for adjudging his suitability for a

responsible office. ... In such a situation, it would be against public policy to permit such a change to enable longer benefit to the person concerned. .....
para 26. ..... Once having a secured entry into the service, possibly in preference to the other candidates, then the principle of estoppel would clearly be applicable and relief of change of date of birth can be legitimately denied. To that extent the decision in Manak chand case does not lay down the correct law (Emphasis supplied)

8.4. Again in another recent decision, namely, in State of U.P. V. Gulaichi reported in (2003) 6 SCC, the Apex Court following the earlier decision of the Apex Court in the case of State of T.N. v. T.V. Venugopalan and State of Orissa V. Ramanath Patnaik held that when the entry was made in the service record and when the employee was in service he did not make any attempt to have the service record corrected, any amount of evidence produced subsequently is of no consequence. The same view was expressed in R.Kirubakaran case vide 1994 Supp (1) SCC 155.

8.5. It cannot be disputed that the above ratio laid down by the Apex Court is squarely applicable to the petitioner's case. Therefore, the petitioner is not entitled to take his claim against the respondents based on the decree dated 06.03.1984 made in S.A.No.615 of 1977 and the Government Memorandum G.O.M.S.No.48 Education Department 12.0 1.1987 without impleading the respondents as party to the proceedings. Hence, the issue No.2 is answered accordingly.

91. Issue No.3: To what relief the petitioner is entitled to?

9.2. In view of the findings of this Court in issue Nos.1 and 2, I do not see any merit in the writ petition. The writ petition is devoid of merits and the same is dismissed. No costs.

Index :Yes
Internet:Yes

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1. The Secretary to Government of India, Ministry of Defence, South Block, D.H.G. Post, New Delhi 110 011.

2. Military Secretary, Army Head Quarters, D.H.G. Post, New Delhi - 110 011.

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